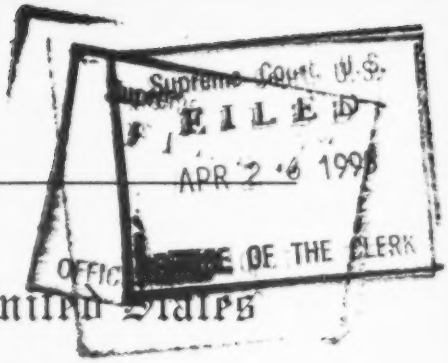
No. 94-1546



In the

Supreme Court of the United States

October Term 1994

In the Matter of DORIS L. SASSOWER,

Petitioner,

-against-

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Dept., HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel, respectively, of the Grievance Committee for the Ninth Judicial District,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of New York
Appellate Division, Second Judicial Department

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

THIS COURT HAS JURISDICTION TO REVIEW 1

A. The Record Shows that the Judgment is Procedurally and Substantively Insupportable and No Adequate and that Independent State Ground Sustains It 3

B. The Constitutionality of New York's Disciplinary Law, *As Written and As Applied*, Is Properly Before This Court 6

CONCLUSION 8

TABLE OF AUTHORITIES

Barry v. Barchi, 443 U.S. 55 (1979)
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)
Burke v. Sugarman, 35 N.Y.2d 39 (1974)
Colin v. Appellate Division, First Department, 3 A.D.2d 682 (2d Dept. 1957), appeal denied 3 A.D.2d 721 (2d Dept. 1957)
Council of Teachers v. BOCES, 63 N.Y.2d 100 (1984)
Cox v. State of Louisiana, 379 U.S. 536 (1965)
Edwards v. State of South Carolina, 372 U.S. 229 (1963)
Hecht v. Monaghan, 307 N.Y. 461 (1954)
In Re Primus, 436 U.S. 412 (1978)
Kaltner v. Kaltner, 268 N.Y. 293 (1935)
Lebron v. National Railroad Passenger Corp., __ U.S. __, 115 S.Ct. 961, 962 (1995)
Matter of Nuey, 61 N.Y.2d 513 (1984)
Matter of Loyal Tire & Auto Center, Inc. NYLJ, 4/24/95, pp.6-7, col 6M-8T
Matter of Russakoff, 79 N.Y.2d 520 (1992)
Olitt v. Murphy, 453 F. Supp.354, 359 (S.D.N.Y. 1978), aff'd, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979)
Pickering v. Board of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968)
Port of New York Authority v. 62 Cortlandt Street Realty Co., 18 N.Y.2d 250 (1966), cert. denied, 385 U.S. 1006 (1967)
Smith v. Whitney, 116 U.S. 167 (1886)
Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 521, cert. denied, 434 U.S. 834 (1977)
St. Andrassy v. Mooney, 262 N.Y. 368 (1933)
Winters v. Lavine, 574 F.2d 46, 60-61 (2d Cir. 1978)
Wood v. State of Georgia, 370 U.S. 375 (1962)
Yee v. City of Escondido, Cal., 112 S.Ct. 1522 (1992)
New York Judiciary Law §§14, 90
New York CPLR §§3211(a)(7), (c)
New York's Rules Governing Judicial Conduct, §100.3(c)
ABA Code of Judicial Conduct, Canon 3C

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PETITIONER'S REPLY MEMORANDUM

THIS COURT HAS JURISDICTION TO REVIEW

Respondents, by the Attorney General of the State of New York, in their Opposing Memorandum [Opp. Memo], do not deny that the "Questions Presented" relating to the constitutionality of New York's attorney disciplinary law, *as written and as applied*, involve serious and substantial deprivations of constitutionally-guaranteed federal rights, wholly unredressed by the state courts.

Nonetheless, the Attorney General argues against review by this Court on the bald claim that the Judgment rests "exclusively on an adequate and independent state ground unrelated to the constitutional question" [Opp. Memo, p. 2].

He further argues, in a footnote, that the *facial* unconstitutionality of Judiciary Law §90 is not properly before this Court because it was raised only in the New York Court of Appeals, which "did not pass upon the issue" when it dismissed Petitioner's appeal as of right and, thereafter, when it denied her motion for leave to appeal. Such decisions, according to the Attorney General, are "not on the merits". [Opp. Memo, fn.2].

As hereinafter demonstrated, neither objection is valid, and this Court's review is essential to prevent evasion by the New York state courts of their duty to enforce federal constitutional rights.

This Court's review is also vital because Respondents are similarly attempting to bar review of Respondent Second Department's June 14, 1991 order interimly suspending Petitioner [A-24][1] and other orders, including the Judgment herein [A-20], in Petitioner's pending federal action under 42 U.S.C. §1983, *Sassower v. Mangano et al.*, 94 Civ. 4514 (S.D.N.Y. 1994), commenced after all her state remedies were exhausted. In such action, Respondents therein, also represented by New York's Attorney General, have raised a subject matter jurisdiction defense under Rooker-Feldman, arguing that "...the District Court has no power to review state court proceedings. *The only permissible review is by the superior state court and/or the Supreme Court.*"[2] (emphasis added). The uncontroverted record shows that the New York Court of Appeals has, *four times*, refused to grant appellate review of Petitioner's interim suspension [A-36, A-49, A-22, A-23]. Thus, the matter is ripe for review by this Court.

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[1] "A-__" citations herein refer to the Appendix of the Petition for Certiorari.

[2] Respondents' January 17, 1995 Memorandum of Law in Support of their Motion for Judgment on the Pleadings, p. 10.

A. The Record Shows that the Judgment is Procedurally and Substantively Insupportable and that No Adequate and Independent State Ground Sustains It

The Attorney General argues the correctness of the Judgment [A-20], with no reference to the record to support his contention that "the state court decision rests on an adequate and independent state ground" [Opp. Memo, p. 2]. His failure to adduce support from the record reflects the fact that the record does *not* sustain the Judgment in *any* respect.

The Attorney General presents no counter-statement of facts to Petitioner's "Statement of the Case" [cert. pet., pp. 3-13] and does not deny or dispute a single fact presented by Petitioner. Consistent with this Court's Rule 15.1, Petitioner's factual statements are deemed conceded.

Inasmuch as the Attorney General does not dispute Petitioner's factual assertions showing that the "interim" suspension of her license is totally devoid of factual or legal basis and that such suspension and its perpetuation are the result of politically-motivated retaliation against her for exercise of First Amendment rights [cert. pet., pp. 3-6 & fn. 4], this Court is duty-bound to undertake "an independent investigation of the whole record" and not accept the Attorney General's conclusory statements at face value. *Edwards v. State of South Carolina*, 372 U.S. 229, 235 (1963), followed in *Cox v. State of Louisiana*, 379 U.S. 536, 545 & n.8. (1965); *Wood v. State of Georgia*, 370 U.S. 375, 386 & n.11 (1962). *See also, In Re Primus*, 436 U.S. 412, 434 (1978); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

Where, as here, there are claims of bias and a tainted tribunal -- which Respondents have not denied -- the factual record must be examined "completely independently" by this Court so as to permit it to confirm that there is no adequate and independent state ground. *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563, 578 n.2 (1968). On this

record, it is clear that the Judgment in question has no basis in state law.

First, under state law, the justices who rendered the Judgment were mandatorily disqualified[3] from doing so and had no subject matter jurisdiction[4] by the very nature of the common law writs, which are the predecessor to New York's CPLR Article 78 statute [A-13].

Second, the Judgment itself reflects egregious violation of the most fundamental legal standards and is procedurally insupportable under state law. The Attorney General does not dispute the facts showing that his pre-answer dismissal motion under CPLR 3211(a)(7) [A-12], granted by the Judgment [A-20], had to be denied as a matter of state law, Petitioner having pleaded facts showing that Respondents were without jurisdiction and that she had no remedy except by Article 78 [cert. pet., p. 8]. By state law, such facts had to be accepted as true for purposes of the dismissal motion[5]. Instead, Respondent Second Department erroneously granted its attorney's dismissal motion, doing so, moreover, "on the merits" rather than on the pleading by, *sub silentio*, converting Respondents' dismissal motion into a summary judgment motion, *sua sponte*, and without the required statutory notice[6] -- all contrary to state law. Moreover, and further contrary to state law, Petitioner was denied summary judgment in her

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[3] Judiciary Law §14 [A-10], New York's Rules Governing Judicial Conduct, §100.3(c)[A-15]; Code of Judicial Conduct, Canon 3C [A-16].

[4] *Colin v. Appellate Division, First Department*, 3 A.D.2d 682 (2d Dept, 1957) citing *Smith v. Whitney*, 116 U.S. 167 (1886), appeal denied 3 A.D.2d 721 (2d Dept. 1957).

[5] *Burke v. Sugarman*, 35 N.Y.2d 39 (1974); *Council of Teachers v. BOCES*, 63 N.Y.2d 100 (1984).

[6] New York CPLR 3211(c) [A-12].

favor[7], for which she had expressly cross-moved under New York's CPLR 3211(c) [A-12] inasmuch as her allegations were established by evidentiary proof and wholly uncontroverted by any probative evidence of Respondents [cert. pet., pp. 8-10].

Third, under the uncontroverted facts set forth in the cert petition [pp. 3-13], there is no legal authority, state or federal, which would permit the suspension of Petitioner's law license [A-24] and its perpetuation for nearly four years or which would permit disciplinary proceedings against her, where there was no prior probable cause finding that she was "guilty" of some act of professional misconduct.

The Attorney General's failure to refute the applicability of *Matter of Nuey*, 61 N.Y.2d 513 (1984) and *Matter of Russakoff*, 79 N.Y.2d 520 (1992), the latter citing this Court's decision in *Barry v. Barchi*, 443 U.S. 55 (1979), establishes that an Article 78 Judgment in Petitioner's favor had to issue since, by state law, Petitioner was entitled to the *immediate* summary relief which Article 78 proceedings are historically intended to provide.

That as of this date -- *more than a year and a half* since the Judgment dismissing the Article 78 proceeding was rendered [A-20] -- the New York state courts have *still* not afforded Petitioner the *immediate* vacatur relief in the disciplinary proceeding, to which she was constitutionally entitled, confirms that Article 78 was the proper vehicle[8].

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[7] *St. Andrassy v. Mooney*, 262 N.Y. 368 (1933); *Kaltner v. Kaltner*, 268 N.Y. 293 (1935); *Port of New York Authority v. 62 Cortlandt Street Realty Co.*, 18 N.Y.2d 250, cert. denied, 385 U.S. 1006.

[8] Cf., *Matter of Loyal Tire & Auto Center, Inc.* NYLJ, 4/24/95, pp.6-7, col 6M-8T, where the New York Supreme Court granted Article 78 relief to a towing company, whose one year "Letter of authorization", which it found to be a "license", from the New York State Thruway , could not be terminated for cause (even after its expiration date), without a hearing. The Court ruled that such "license" was a sufficient property interest to require a due process hearing under the State

Finally, the Attorney General's claim [at p. 2] that the Judgment is supported by "an adequate and independent state ground" rests on the conclusory assertion in the Judgment that "petitioner's jurisdictional challenge can be addressed in the underlying disciplinary proceeding" [A-20]. Yet, the Attorney General does not controvert the fact that *immediately* following rendition of the Judgment, Petitioner tested the purported remedy in the disciplinary proceeding and it proved to be wholly *non-existent* [cert. pet., "Respondents' Post-Judgment Actions", at pp. 10-11, including transcript excerpts [A-64-86] and Respondent Second Department's peremptory January 28, 1994 order [A-87]].

The Attorney General does not deny such extraordinary facts and documentary evidence demonstrating conclusively the lack of any remedy in the disciplinary proceeding. Nor does he deny that same were presented to the New York Court of Appeals, which, by declining review, erroneously upheld jurisdiction-less proceedings without any state remedy.

B. The Constitutionality of New York's Disciplinary Law, *As Written and As Applied*, is Properly Before This Court

This Court's jurisdiction to address the unconstitutionality of New York's attorney disciplinary law, *as applied*, is conceded by the Attorney General [Opp. Memo, at fn. 2]. With such concession, the *facial* unconstitutionality of Judiciary Law §90 [A-9] and the Appellate Division, Second Department's Rules Governing the Conduct of Attorneys, 22 NYCRR §691.4 et seq. [A-4] lies within this Court's jurisdiction as a "subsidiary question" under Rule 14.1(a) of this Court.

The case of *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992), cited by the Attorney General, specifically recognizes

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Administrative Procedure Act, relying on *Hecht v. Monaghan* 307 N.Y. 461 (1954).

that:

> "[a] litigant seeking review in this Court of a claim properly raised in the lower courts...generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.... The petitioner can generally frame the question as broadly or narrowly as he sees fit."

Id. at 1532; *accord, Lebron v. National Railroad Passenger Corp.*, __ U.S. __, 115 S.Ct. 961, 962 (1995).

The constitutionality of New York's attorney disciplinary law, *as applied*, must be looked at broadly, since it is plainly intertwined with the law *as written*. Evaluation of the constitutionality of the order interimly suspending Petitioner's law license [A-24] calls for examination of Judiciary Law §90 [A-9], which, as heretofore recognized by state law, *Matter of Nuey*, *supra*, does not authorize interim suspension orders. Consequently, Judiciary Law §90 makes no provision for appellate review therefrom.

Moreover, in Petitioner's aforementioned §1983 federal action, Respondents contend, citing *Olitt v. Murphy*, 453 F. Supp.354, 359 (S.D.N.Y. 1978), aff'd, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 444 U.S. 825 (1979) [9], that: "Even where, as here, the New York Court of Appeals 'dismissed summarily on the ground that no substantial constitutional question was directly involved, the decision was final and was *on the merits*'...so that *res judicata* would apply", Respondents' Motion for Judgment on the Pleadings, p. 22,

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[9] See also cases cited at fn. 24 of *Olitt, supra, e.g., Winters v. Lavine*, 574 F.2d 46, 60-61 (2d Cir. 1978) and *quoting Turco v. Monroe County Bar Ass'n*, 554 F.2d 515, 521, cert. denied, 434 U.S. 834 (1977): "[W]e must assume that the Court of Appeals' denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits."

cited above at fn.2. Hence, Respondents should be estopped by virtue of such inconsistent position from making their fn.2 argument here that the New York Court of Appeals' dismissal of Petitioner's appeal as of right [A-22] and its denial of Petitioner's subsequent motion for leave to appeal [A-23] were "not on the merits".

From the foregoing, this Court clearly has jurisdiction to review the subject Judgment, which is unsupported by adequate and independent state grounds, and the substantial federal questions raised therein being properly before the Court.

CONCLUSION

In light of Respondents' failure to confront the issues presented in the petition for certiorari, a Writ should be granted, the need for review being indisputable and compelling. Indeed, Petitioner respectfully submits that summary reversal and immediate vacatur of her interim suspension is constitutionally mandated.

Dated: April 25, 1995
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